UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 90

Docket No. CH-1221-12-0297-W-1

Debra K. Mudd,

Appellant,

v.

Department of Veterans Affairs,

Agency.

November 19, 2013

Michael L. Boylan, Esquire, Louisville, Kentucky, for the appellant.

Patrick J. Neil, Esquire, Louisville, Kentucky, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision, issued by the administrative judge, which dismissed the appellant's individual right of action (IRA) appeal for lack of jurisdiction.[1] For the reasons discussed below, we GRANT the appellant's petition for review and REMAND the case to the regional office for further adjudication in accordance with this Order.

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

BACKGROUND

¶2 The appellant filed an IRA appeal, alleging that she disclosed that the agency's scheduling practices violated several statutory provisions and agency directives. Initial Appeal File (IAF), Tab 1; *id.*, Tab 9 at 1; *id.*, Tab 10, Subtab A at 6. Specifically, the appellant claimed that on December 12, 2008, she made a protected disclosure when she asked an agency compliance officer to investigate and intervene in a dispute between the agency and certain employees, including the appellant, over the agency's scheduling practices. IAF, Tab 10, Subtab A at 6. She further alleged that on December 31, 2008, she made a protected disclosure when she filed a grievance under the applicable collective bargaining agreement, which alleged that such practices violated "policies and laws; Title 5, Part 3, Subpart E, Chapter 61, Subchapter I, 6101, 3(b)(c)(e) and VA Directive 5011/2 Hours of Duty and Leave 2(f)." IAF, Tab 10, Subtab A at 6; *see id.* at 1-2; IAF, Tab 7, Subtab B at 17-27. The compliance officer indicated in an email to the appellant dated June 15, 2009, inter alia, that, because a grievance had been filed, additional concerns should be addressed by the union. IAF, Tab 7, Subtab B at 17. In her Board appeal, the appellant asserted, inter alia, that, in reprisal for her protected disclosures, the agency took several personnel actions against her, including changing her schedule and failing to consider her for two vacant social worker positions for which she had applied. IAF, Tab 10, Subtab A at 7.

¶3 The administrative judge dismissed the IRA appeal for lack of jurisdiction, finding that the appellant failed to nonfrivolously allege that she made a protected disclosure. IAF, Tab 12, Initial Decision (ID) at 2, 5. The appellant has filed a petition for review of this decision. Petition for Review (PFR) File, Tab 1. The agency has not filed a response to the appellant's petition for review.

ANALYSIS

¶4 The Board has jurisdiction over an IRA appeal if the appellant has exhausted her administrative remedies before the Office of Special Counsel

(OSC) and makes nonfrivolous allegations that: (1) she engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). Here, the administrative judge determined that, although the appellant established that she had exhausted her administrative remedy with OSC and made a nonfrivolous allegation that the agency took or threatened to take a personnel action, she failed to make a nonfrivolous allegation that she made a protected disclosure. [2] ID at 4-5.

¶5 Protected whistleblowing occurs when an appellant makes a disclosure that she reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 17 (2011); *see* 5 U.S.C. § 2302(b)(8).[3] The proper test for determining whether an employee had a reasonable belief that her disclosures were protected is whether a disinterested observer with knowledge of the essential facts known to, and readily ascertainable by, the employee could reasonably conclude that the actions evidenced a violation of a law, rule, or

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[2] The administrative judge did not reach the issue of whether the appellant made a nonfrivolous allegation that the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action.

[3] We note that the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, 126 Stat. 1465, which was enacted after the initial decision was issued in this case, amends subsection (b)(8) by expanding protections to:

> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences:
>
> (i) *any* violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(emphasis added). We have considered this amendment and find that it does not change the result in this case.

regulation, or one of the other conditions set forth in 5 U.S.C. § 2302(b)(8). *Mason*, 116 M.S.P.R. 135, ¶ 17.

¶6 The administrative judge determined that, insofar as the appellant alleged that she made disclosures in the context of her grievance under the governing collective bargaining agreement, such disclosures are not protected under section 2302(b)(8). ID at 4-5. We agree. Reprisal for exercising a grievance right is a prohibited personnel practice under 5 U.S.C. § 2302(b)(9), not 5 U.S.C. § 2302(b)(8). *See, e.g.*, *Serrao v. Merit Systems Protection Board*, 95 F.3d 1569, 1576 (Fed. Cir. 1996); *Davis v. Department of Defense*, 103 M.S.P.R. 516, ¶ 11 n.2 (2006); *Fisher v. Department of Defense*, 47 M.S.P.R. 585, 587-88 (1991) (section 2302(b)(8) does not extend to reprisal for filing grievances, which is protected by section 2302(b)(9)).

¶7 The newly-enacted WPEA would not change our analysis of this aspect of the initial decision. Among other things, the WPEA expanded the scope of 5 U.S.C. § 2302(b)(9), to include:

> (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation--
>
> (i) with regard to remedying a violation of paragraph (8); or
>
> (ii) other than with regard to remedying a violation of paragraph (8).

The WPEA extended the Board's IRA jurisdiction to claims arising under 5 U.S.C. § 2302(b)(9)(A)(i), but not to those arising under (b)(9)(A)(ii). WPEA § 101(b)(1)(A). The substance of the appellant's grievance did not concern remedying an alleged violation of subparagraph (b)(8). Therefore, insofar as the appellant alleged that the agency took personnel actions in reprisal for her grievance, the administrative judge correctly determined that the Board lacks jurisdiction to consider such allegations in the context of this IRA appeal.

¶8 The administrative judge also determined, however, that, to the extent that the appellant made the same disclosures outside of the grievance procedure, she made no factual allegations that show a reasonable belief that the agency's

scheduling practices violated any law, rule, or regulation. ID at 5. We disagree. The standard for establishing jurisdiction is a nonfrivolous allegation of facts that, if proven, would show that the appellant made a protected disclosure, i.e., that the matter disclosed was one which a reasonable person in her position would believe evidenced one of the situations specified in 5 U.S.C. § 2302(b)(8). *Smart v. Department of the Army*, 98 M.S.P.R. 566, ¶ 9, *aff'd*, 157 F. App'x 260 (Fed. Cir. 2005). A "violation of any law, rule, or regulation" is one of those situations. 5 U.S.C. § 2302(b)(8)(A)(i). Any doubt or ambiguity as to whether an appellant raised a nonfrivolous allegation of a reasonable belief should be resolved in favor of a finding that jurisdiction exists. *Smart*, 98 M.S.P.R. 566, ¶ 9; *see Pasley v. Department of the Treasury*, 109 M.S.P.R. 105, ¶ 16 (2008). At the jurisdictional stage in an IRA appeal, an appellant is not required to prove that her disclosure is protected under 5 U.S.C. § 2302(b)(8). *Smart*, 98 M.S.P.R. 566, ¶ 9.

¶9 Here, as stated above, the appellant has alleged that she disclosed that the agency violated various laws, rules, and regulations governing scheduling practices. IAF, Tab 10, Subtab R at 14. We find that the appellant has raised a nonfrivolous allegation that a person in her position, i.e., a mental health associate without any special expertise in legal matters or other experience in interpreting agency regulations, could reasonably conclude that she disclosed evidence of a violation of a law, rule, or regulation to the agency compliance officer. *See Czarkowski v. Department of the Navy*, 87 M.S.P.R. 107, ¶ 11 (2000). In so finding, we note that the agency appears to have granted the appellant some relief in connection with her grievance over these practices. *See* IAF, Tab 7, Subtab D at 13.

¶10 We further find that the appellant has nonfrivolously alleged that her protected disclosures were a contributing factor in the agency's decision to take or fail to take a personnel action. To satisfy the contributing factor criterion, an appellant need only raise a nonfrivolous allegation that the fact or content of the

protected disclosure was one factor that tended to affect the personnel action in any way. *Mason*, 116 M.S.P.R. 135, ¶ 26. One way to establish this criterion is the knowledge-timing test, under which an employee may nonfrivolously allege that the disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Id.* Here, the record indicates that the officials taking the personnel actions knew of the appellant's disclosure. *See* IAF, Tab 7, Subtab B at 19, Subtab D at 13, 15. Further, the personnel actions at issue are alleged to have begun within 1 year of the time that she made her disclosures to the compliance officer in December 2008 and to have continued until February 15, 2012. IAF, Tab 1; *id.*, Tab 10, Subtab A at 6-7. We find that the appellant has made nonfrivolous allegations that her disclosures were a contributing factor under the knowledge-timing test. *See Agoranos v. Department of Justice*, 119 M.S.P.R. 498, ¶¶ 21-23 (2013); *see generally Gonzalez v. Department of Transportation*, 109 M.S.P.R. 250, ¶¶ 19-20 (2008).

¶11 There remains, however, a further jurisdictional issue that was not addressed below. Our review of the record reveals that the appellant failed to adequately establish that she exhausted her remedies before OSC. That the administrative judge summarily concluded that the appellant had done so, ID at 4, and the agency did not dispute it, is of no consequence. *See Ney v. Department of Commerce*, 115 M.S.P.R. 204, ¶ 7 (2010) (the issue of the Board's jurisdiction is always before the Board and may be raised sua sponte by the Board at any time).

¶12 To establish that she has exhausted her OSC remedy, the appellant must show what specific claims she presented to OSC. *See Kukoyi v. Department of Veterans Affairs*, 111 M.S.P.R. 404, ¶ 13 (2009). The appellant can demonstrate exhaustion, inter alia, by providing her OSC complaint, any amendments to the complaint, OSC correspondence discussing the claims, and her responses to OSC

correspondence discussing the claims. *Id.* Although the appellant appears to have filed two complaints with OSC concerning the same disclosures, *see* IAF, Tab 7, Subtab B at 12-16, the record contains only one of them.

¶13 Because the initial decision does not set forth the basis for the administrative judge's determination that the appellant exhausted her OSC remedy, we remand the appeal so the administrative judge can further address this jurisdictional issue. Because the appellant has made nonfrivolous allegations that she made a protected disclosure that was a contributing factor in the agency's decision to take a personnel action, she is entitled to a hearing if she can show that she exhausted her OSC remedy.[4] *See Kukoyi*, 111 M.S.P.R. 404, ¶ 10; *see also Baldwin v. Department of Veterans Affairs*, 113 M.S.P.R. 469, ¶ 6 (2010) (in cases involving multiple alleged protected disclosures and personnel actions, an appellant establishes Board jurisdiction over her IRA appeal when she makes a nonfrivolous allegation that at least one alleged personnel action was taken in reprisal for at least one alleged protected disclosure).

[4] The appellant contends on review that the administrative judge erroneously found that she did not request a hearing. PFR File, Tab 1 at 1. We agree with the appellant in this regard. *See* IAF, Tab 1 at 2.

ORDER

¶14 For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Remand Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.